

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

AYAKA T.,

Claimant,

vs.

GOLDEN GATE REGIONAL CENTER,

Service Agency.

OAH No. 2006120059

**DECISION**

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in San Mateo, California on November 27, 28, and 29, 2007, December 5, 6, and 27, 2007, and January 3, 4, and 9, 2008.

Louise J. Katz, Attorney at Law, represented claimant.

Rufus L. Cole, Attorney at Law, represented service agency.

The record was left open for submission of closing briefs. Claimant's opening brief was received and marked for identification as Exhibit UUU. Service Agency's response brief was received and marked for identification as Exhibit 27. Service agency's objection and motion to strike portions of claimant's timeline was marked as Exhibit 28. Claimant's request for an extension of time to file the reply brief was granted. Claimant's reply brief was received and marked as Exhibit VVV. The record was closed and the matter was submitted for decision on March 12, 2008.

**RULING ON MOTION TO STRIKE**

Service agency moves to strike portions of claimant's timeline filed with the closing brief as argumentative, irrelevant, incomplete and exceeding page limitations. The timeline is not evidence and it is not considered as such. Those portions of the timeline that are not supportive by the evidence or were argumentative were not considered.

## ISSUE

Whether claimant is eligible to receive regional center services and supports by reason of a condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

## FACTUAL FINDINGS

1. In a notice of proposed action dated October 31, 2006, Golden Gate Regional Center (GGRC) notified claimant Ayaka T. of its decision that she was not eligible for regional center services. Claimant filed an appeal and this hearing followed.

2. This is the second time claimant has sought services through GGRC. Her first request was denied in June 1999. She did not appeal that determination.

### Claimant's Evidence

3. Claimant was born in Japan and moved to the United States in April 1992, at the age of six. She is the middle child and has an older sister and younger brother. In Japan, she had attended a competitive private preschool program with a three-year curriculum, attended a Kumon program where she studied math and Japanese, attended a Yamaha music program and took classes in gymnastics. Because of her abilities, claimant was in advanced classes, and often chosen for leadership roles.

After moving to the United States, claimant was placed in public school but she continued with the Kumon program. She attended Japanese school on Saturdays. She took private piano lessons, swimming lessons, and was a girl scout. She learned English quickly and made many friends.

4. On January 27, 1996, while in the third grade (and just before she turned nine years old) claimant suffered a serious injury to her brain after she was accidentally dropped on her head on cement by classmates at the Japanese school. This injury was followed by multiple lengthy hospitalizations at Mills and then Lucille Salter Packer Children's Hospital at Stanford for fever and prolonged seizures caused by viral encephalitis. Ultimately, the traumas to her brain were classified as traumatic brain injury (TBI). After these injuries, claimant no longer followed the path of a typically developing child.

5. After claimant's seizures were controlled, she returned to the schools she had been attending. Her abilities were different: she had difficulty concentrating; she could not do the advanced math she had been doing, she had difficulty learning new things; she could not do group activities; she acted immaturely with children her age; and she lost her leadership skills. Because of the seizures, she could not swim. Claimant's parents hired tutors, and tried biofeedback. Eventually she was required to quit the Kumon program, Japanese school, piano lessons and girl scouts.

6. Claimant's difficulties in the classroom and with her academics persisted. In the fall of 1997, when claimant was in fifth grade, the parents formally requested special education services. The request was denied. The family saw little progress in the fifth grade. In the sixth grade, when she entered middle school, she could not handle the difficulty or the amount of homework.

7. The family was referred by Stanford to the Children's Health Council in Palo Alto in May 1997, when claimant was 10 years old. A complete neuropsychological evaluation was conducted by Psychology Postdoctorate Fellow Kristin Nicholas, Ph.D., and Psychologists Tina Guterman, Ph.D., and Patricia Mittelstadt, Ph.D. A battery of tests was administered, including the Wechsler Intelligence Scale for Children (3rd Ed.) (WISC-III), selected subtests of the Wechsler Individual Achievement Test (WIAT). Claimant's scores on the WISC III were a Verbal IQ of 95, a Performance IQ of 110 and a Full Scale IQ of 102. She scored 109 on the Freedom from Distractibility Index and 137 on the Processing Speed Index.

Claimant's performance indicated overall cognitive functioning in the average range when compared to other children of her age, but with much variability. Her strengths were in the areas of visual motor processing speed, visual perceptual skills, visual motor integration, and math. Relative weakness was noted in the reading comprehension and written expression. A significant area of weakness was found in the executive functioning domain, including strategic problem solving, sustained attention, behavior inhibition, and organization.

It was noted that claimant was "experiencing considerable symptoms of depression and anxiety, including sadness, low self-esteem, loneliness, mild suicidal ideation, worry and irritability. These symptoms appear particularly salient around her academic struggles and history of seizures. . . . Such symptoms are not uncommon for students who are struggling academically and are aware of their cognitive weaknesses."

The report listed as an Axis I diagnosis: cognitive disorder not otherwise specified (with symptoms including poor sustained attention, impulsivity, poor strategic planning, and organizational problems); and adjustment disorder with mixed anxiety and depressed mood.

8. In addition to her educational difficulties, claimant developed behavioral and psychiatric problems as a result of her brain injuries. Among other things, at age 12 she had severe sleep disturbance, symptoms of paranoia and visual hallucinations, obsessive-compulsive symptoms, and personality changes. She had periods of aggressive behaviors with her parents. She was psychiatrically hospitalized in May 1999 where she was assessed as having post encephalic syndrome with psychiatric cognitive changes. She was admitted to a partial hospitalization program through Stanford in June 1999 to help assess, among other things, an appropriate educational placement for her and appropriate treatment.

As of June 1999, her treating physician, Richard Shaw, M.D., listed as Axis I diagnoses: personality changes due to encephalitis; psychotic disorder due to encephalitis with hallucinations and delusions; and mood disorder due to encephalitis. As Axis II, the

diagnosis was cognitive deficits secondary to brain injury and encephalitis. As Axis III, the diagnosis was status post viral encephalitis and head injury.

9. A second evaluation through Children's Health Council was performed in January 1999 by Psychologists Cynthia Peterson, Ph.D., and Patricia A. Mittelstadt, Ph.D. Claimant was then 11 years, 10 months old, and in the sixth grade. Claimant's scores on the WISC III were a Verbal IQ of 92, a Performance IQ of 106 and a Full Scale IQ of 98. She scored 101 on the Freedom from Distractibility Index and 93 on the Processing Speed Index. Her overall performance was within normal limits, but with much variability in subtests, and with a lower verbal than nonverbal performance. The examiners noted that claimant had significant difficulty sustaining attention and concentrating in all activities, and that these difficulties had increased since the 1997 testing. Decreased functioning in the areas of executive functioning was also noted.

10. In March 1999 the family requested that claimant be reevaluated for special education services. Claimant was evaluated by school psychologist C. Joanne Crawford, Ph.D. Dr. Crawford issued an integrated assessment report dated June 17, 1999, in which she determined that claimant was eligible for special education services as a child with emotional disturbances. Eventually, claimant was also found eligible for special education services on the basis of traumatic brain injury.

Among many tests she administered, Dr. Crawford administered to claimant's mother the Vineland Adaptive Behavior Scale: Parent Edition. The test revealed that at age 12, claimant's adaptive behavioral functioning corresponded to average in daily living skills, low-average communication skills, and significantly below-average functioning in socialization. Areas of particular weakness were noted in expressive language, interpersonal relationships, and the use of play and leisure time.

11. In the fall of 1999, claimant was placed at Esther B. Clarke School at the Children's Health Council. There she received, in addition to the education component, therapeutic services, including individual therapy, group therapy, and family therapy.

School psychologist and classroom therapist Sarah Powell, Ph.D., wrote a psychotherapy progress report dated September 1, 2000, when claimant was age 13, six months. In that report, Dr. Powell noted that the focus of psychotherapy was directed at helping claimant understand and cope with the full implications of her disability: "Her sense of loss of confusion regarding her disability is compounded by cognitive deficits that negatively impact her social and emotional understanding and impair her problem solving skills. The loss of school friends, musical talents, academic excellence, even the ability to comprehend these losses had devastated this child and she longs to understand what is unexplainable or senseless at best."

12. Claimant remained at Esther B. Clark for the school years 2000 to 2001 (8th grade) and 2001 to 2002 (9th Grade).

13. San Mateo High School District school psychologist, Myra Balatan, M.S., conducted a psychoeducational evaluation of claimant at age 15 years, 10 months. Her report of December 9, 2002, reflects claimant's scores on the WISC III to be a Verbal IQ of 76, a Performance IQ of 89 and a Full Scale IQ of 81. She scored 75 on the Freedom from Distractibility Index and 111 on the Processing Speed Index. While her overall performance was below average, her verbal IQ was significantly below-average.

14. Starting in the 2002 to 2003 school year, she continued with special education at Esther B. Clark, with a transition to a special day class at Peninsula High School for a vocational program and completion of high school. At the end of her fifth year of high school (June 2006) claimant received a certification of completion of high school.

15. San Mateo High School District school psychologist Judy Werner, M.S., PPS, conducted a psychoeducational evaluation of claimant at age 18 years, 11 months. (Claimant was then a fifth-year senior.) Werner's report of January 26, 2005, reflects claimant's scores on the Wechsler Adult Intelligence Scale (3d Ed.) (WAIS III) to be a Verbal IQ of 73, a Performance IQ of 87 and a Full Scale IQ of 79. She scored 110 on the Processing Speed Index. Complainant's overall cognitive abilities were in the below-average range. She showed average ability in nonverbal reasoning, and below-average verbal reasoning. In her summary, Werner noted:

Abstract reasoning skills are weaknesses both verbally and visually. Ayaka has more difficulties interpreting and analyzing complex information when it was not provided in a meaningful context. She additionally demonstrated difficulties with responding to items that relied on her life experiences to answer correctly.

Werner found that claimant continued to meet special education eligibility requirements based on TBI criteria as well as emotional disturbance criteria.

16. Through her vocational training class, claimant was placed at Old Navy with and aide and she was taught to fold tee shirts, and to pick up clothes in the fitting rooms and put them on hangers. She was also placed at Mollie Stones, a grocery store. A part-time position, even with an aide, proved too stressful.

17. According to claimant's mother, claimant did not have any friends and did not date while in high school. One year she participated in Special Olympics on the suggestion of her teacher. She did enjoy the girls she met through Special Olympics.

18. In her fifth year of high school, claimant decided she wanted to live outside of the family home. One day she told her mother that she had found a room and was moving the following day. The next morning claimant placed a chair with clothes on it in front of the front door and asked her mother to drive her. Claimant has learned of the place through a man she had met, but did not know. She had never visited the room, and she did not

understand that she would have to pay rent or make a deposit. Claimant had not thought through how she would get to school from there.

19. Claimant had a checking account as a part of her living skills curriculum in high school. She always wanted a credit card like her mother. In the spring of 2006, claimant went on-line and obtained approximately 20 credit cards in her name. Many of these companies required large application fees which were removed directly from her bank account. The end result was that claimant received a series of insufficient fees notices and fees. It cost over \$1,000 to clear up the charges.

20. Following high school, claimant developed the ability to meet men through a website called match.com. Initially her mother supported her in this, and accompanied her to San Francisco to meet her first date. The first date went fine, and claimant complied with her mother's requirement that she call her each time they changed locations. The second date did not go as well. Complainant did not keep in contact with her mother and went missing. Police were called but would not assist as claimant was over 18. Eventually claimant contacted her mother the next day. Claimant was in a hotel room, but had no idea where she was. Claimant said the man had taken away her cell phone.

A few weeks later, claimant took the train to San Francisco to meet again with a man she had met over the internet. She waited a number of hours for the man, who did not arrive, and then agreed to go with two other men that she met on the street. (Claimant told her mother she agreed to go with them when they said she was cute.) The two men took her to a trailer, where, over the next three days, she was repeatedly sexually assaulted by three men.<sup>1</sup>

21. Claimant was hospitalized and evaluated at Stanford from June 26, 2006, through July 11, 2006. Her medical team recommended that she be placed in a facility where she could have continual monitored care because of her cognitive disorder.

22. Claimant was discharged to Nueva Vista, an inpatient psychiatric facility in Morgan Hill on July 12, 2006. Her diagnosis on entry was Axis I, impulse control not otherwise specified; Axis III, history of brain injury; and Axis IV, psychosocial problems due to sexual assault.

23. Following the sexual assault, claimant's parents sought and obtained a conservatorship of her person and estate.

24. Claimant has remained at Nueva Vista since June of 2006.

25. Claimant has weekly individual therapy with Paul Trugman, MFT. The focus of his therapy has been to help claimant develop and improve her social skills, and her insight into interaction with people generally, and with men, particularly. In his opinion, claimant

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<sup>1</sup> It is noted that claimant has given various accounts of this incident.

has very serious deficits in the areas of communicating accurately, in understanding the consequences of her behavior with men, in picking up and interpreting social cues, and in problem solving. Claimant has poor impulse control and poor judgment. Her deficits interfere with her ability to hold a job in that while she can do basic tasks, she gets confused and overwhelmed easily. Her deficits also interfere with her ability to be safe while in the community. Claimant meets people easily, but she cannot understand their intentions, which makes her especially vulnerable and at risk. What concerns Trugman the most is that claimant appears as if she is learning, but then her comments at a subsequent session reveal that she has not learned at all.

Claimant became pregnant while at Nueva Vista. In Trugman's opinion, claimant is not able to provide for a child, either emotionally or financially, and because of her emotional and cognitive deficits it would not be safe for her to care for a child.

26. Claimant has held one job while at Nueva Vista, working as a waitress at a Japanese restaurant. The facility staff provided her transportation each way. She quit after three months due to the stress of the job. Claimant was able to handle only one task at a time, and she could not remember the items on the menu. She was easily flustered at work when minor things went awry, and would cry. One day she came to work with an eye infection. She could not understand why the restaurant would not allow her to work.

27. Claimant has attended classes at Gavilan College while at Nueva Vista. The classes are in the nature of enrichment classes (singing and art), which she takes for fun and not for academic credit. The college is ten minutes from the facility. Claimant takes the bus to and from college. But the bus picks up claimant at Nueva Vista, and its last stop is at the college. She is not required to change buses.

28. Claimant receives a weekly allowance from her parents in order to buy snacks or lunch at college. She tends to spend the money at once and then call her parents and say she is hungry. Despite learning about money in high school, she has forgotten how to break bills for use in vending machines. The family tried to teach her to use money for bus fare, but that proved so problematic that they gave up and provide her with a bus pass.

29. Claimant cannot follow simple directions on boxes to cook and cannot measure ingredients correctly. She does not understand how to adjust heating elements so the pans do not burn. She cannot remember simple cooking instructions.

30. Claimant does not like change in routines. She needs concrete plans and wants to know the next step. She becomes upset when scheduled events change.

31. Margot Thienemann, M.D., has been claimant's treating psychiatrist or supervisor of claimant's treating psychiatrist since May 1998. She presented expert testimony with respect to the effect of TBI on a child's development generally, and on claimant specifically. Dr. Thienemann was a persuasive expert witness.

Claimant was on target developmentally until the injury. As the injury occurred prior to puberty, she went into adolescence with a damaged brain. She managed to keep some of the skills she had developed before the injury, but the injury affected her ability to develop, to learn, to think abstractly, and to function. Executive functioning, the part of the brain that organizes and plans what we do, is only partially developed at age nine. When a traumatic brain injury occurs at that stage of development, it is predictable that the child will have difficulties in focusing, attending, and concentrating. Another hallmark is cognitive inflexibility; which is characterized as the inability to adjust plans or thinking or to solve problems in more than one way. Anger, frustration and aggression are also hallmarks of the TBI.

Claimant has all of these characteristics. She looks cute and capable but she is not. As a result of her cognitive inflexibility, claimant will not talk about things she does not want to talk about – she will be silly and talk about clothes. She cannot set realistic goals: she wants to be a makeup artist, but cannot formulate a plan on how to do that. She has problems processing information in that she cannot pay attention, she cannot remember it, she cannot categorize it, and she cannot get to the main idea. She also cannot generalize information, so she can recite a rule but she cannot translate it into action. She does not have the ability to pick up social cues, or understand intentions of those she interacts with. Claimant has impaired judgment.

These problems have proven to be dangerous for claimant as evidenced by her conduct which has made her vulnerable to sexual assaults, and unprotected sexual activities. They are why she has difficulty keeping a job: she has difficulty in social interactions, she has difficulty in dealing with variation, and she cannot handle multiple steps.

In Dr. Thieneman's opinion, claimant's deficits in executive functioning due to her TBI are similar to one who has mild mental retardation due to Down's syndrome, and the treatment for the deficits are the same. Claimant's impaired judgment and lack of cognitive flexibility would be similar to one with mild mental retardation due to Down's syndrome.

With respect to IQ scores, Dr. Thieneman notes that claimant's scores have stabilized but that her functioning is continuing to deteriorate for her age. Claimant is capable of learning some things, but that she will not appreciatively mature in her relationships with people generally, or with men particularly.

32. Bradley Manning, Ph.D., is a licensed psychologist, and worked for many years in the school system as a school psychologist and counselor. He is familiar with services for children with TBI.

Dr. Manning reviewed claimant's school records, met with claimant, and with her family. In reviewing her school records, he concluded that her special education program was consistent with that provided to a child with mild mental retardation. She was taught in a restrictive and highly structured environment and her instruction focused on developing life skills and social skills and vocational skills rather than academics. Her curriculum and



materials were modified and appropriate for claimant's developmental abilities rather than her chronological age.

33. Linda Siino, M.S.W., has had a 30-year career working with the developmentally disabled. She worked for 10 years with San Andreas Regional Center, and for the last 12 years she has been associated with Hope Services in San Jose, an agency providing supported living and independent living skills to the developmentally disabled. Most of Hope's clients are consumers of the San Andreas Regional Center. Siino's current position is Director of Community Living Services; previous to that she was Manager of Client Advocacy and Resources.

Siino met with claimant for an hour and one-half to assess her capabilities. They walked from the facility to a nearby restaurant. Claimant was able to direct Siino to the restaurant, which was one she knew well. She was able to order a sandwich, but it was the same sandwich she always ordered. Claimant was dressed stylishly, and had purchased her clothes at a thrift shop. She understood that her parents had put her at the Nueva Vista to be safe.

In Siino's view, claimant is similar to clients with mental retardation; despite claimant's apparent capabilities, she cannot think or reason abstractly. For example, claimant described the sexual assault incident in matter of fact language, saying that the men "had sex with me," rather than assaulted her, and that the men were "really nice" to bring her home. Claimant did not have an understanding of how dangerous a situation she has been in. When Siino asked about her health (as the last meeting had been cancelled due to claimant's illness), claimant happily answered that she was pregnant, and added that the pregnancy made her mother "sad." Claimant's response was naïve and immature, and not the response Siino would expect from a 22-year-old. Claimant described her community college classes in a way that left Siino questioning the accuracy of the information.

#### GGRC's Evidence

34. The interdisciplinary team reviewing claimant's eligibility consisted of staff physician John D. Michael, M.D., behavioral psychologist Telford I. Moore, Ph.D., and social worker Kelly Blankenship, L.C.S.W.

Dr. Moore reviewed the 1997 assessment by Nicholas, the 1999 assessment by Peterson, the 2002 report of Balatan and the 2006 report of Werner. He also conducted his own assessment of claimant at Nueva Vista on October 2, 2006. Claimant was age 19 years, 7 months. Claimant's scores on the WAIS- III were a Verbal IQ of 74, a Performance IQ of 90 and a Full Scale IQ of 79, a Working Memory Index of 75, and a Processing Speed Index of 131. On the Wechsler Memory Scale (3rd Ed.) (WMS-III) claimant's scores were an Auditory Immediate Memory Index of 53, a Visual Immediate Memory Index of 65, a Total Immediate Memory Index of 49, a Delayed Memory Index of 61, an Auditory Recognition Memory Index of 80, a Visual Delayed Memory Index of 75, a total Delay Index of 66, and Working Memory Index of 69.

Dr. Moore was impressed with claimant's functioning. When he initially arrived for their appointment in the morning, she was irritated and noncompliant. She wanted to go to school, and agreed she would return at 4:00 p.m. so that he could do her testing. When she arrived back at Buena Vista, she approached Dr. Moore and asked if he were ready. She was pleasant and cooperative during the two and one-half hours of testing. She spoke about school. He was impressed with her level of interpersonal skills.

35. Upon reviewing the tests, Dr. Moore concluded that claimant had a clear decline in cognitive functioning following the 1997 trauma, but that all tests from 2000 on showed a consistent and stable Full Scale IQ of 79/80, which would not meet the diagnostic criteria for mental retardation. In his view, her impaired functioning is neuropsychological in nature, and not a developmental disorder. He noted:

Although [claimant's] impairment is severe and does require oversight, it is impairment in executive functioning and not of global cognitive delays. . . . It seems that [claimant's] limitations have to do with judgment, impulsivity, and planning rather than the global impairments seen in persons with mental retardation.

Claimant does not have needs similar to those with mental retardation. Rather, she has needs similar to those with impaired executive functioning, as identified by Dr. Nicholas and as well known in the field of head injuries.

Claimant's performance on the WMS-III was also consistent for one with a brain injury, but not one with a mental retardation. In his view, claimant can learn.

In addition, in his view, the treatment modality that she needs is not the same modality as one with mental retardation. She can handle more complex information, more complex instruction; she does not require the amount of repetition or slowed delivery of information that is required for one with mental retardation. In his view, she would do better with normal instruction.

36. Dr. Moore made a subsequent visit to Buena Vista on June 9, 2007, to get an updated view on claimant's functioning and to perform an assessment of her adaptive functioning. He performed a Vineland Adaptive Behavior Scale with answers provided by a Josephine Robinson, a facility employee who had been one of claimant's aides. The woman was recommended to Dr. Moore by the facility as the person who had the most contact with claimant at that time.

Dr. Moore compared the test results with the results of the Vineland test given to claimant's mother by Dr. Crawford in 1999. He was surprised by the similarity in results. He concluded that claimant's adaptive functioning was no better or worse than it was in

1999. The Vineland results served to confirm to Dr. Moore that claimant's abilities outweigh her inabilities, and that she is functioning effectively, but make bad decisions because of her impaired executive functioning. She has needs that are consistent with one with a brain or neurological impairment, but they are not similar to one with mental retardation.

The Vineland test results are based solely on the responses given by Robinson, who had left the facility and was not subject to cross-examination at hearing. Robinson had expressed to claimant's mother that she was against the idea of claimant "going to" GGRC. Dr. Manning is of the view that it is a preferred practice to have the Vineland administered to at least two people who would know claimant in different environments. Dr. Manning has serious questions about the validity of the test results in this case. For all these reasons, while the Vineland test results were admitted in evidence, they are not given much weight.

### LEGAL CONCLUSIONS

1. This matter is governed by the Lanterman Developmental Disabilities Services Act, under which the Legislature has declared responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4500 et seq.<sup>2</sup>) The Act mandates that "an array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (§ 4501.) The purpose of the scheme is twofold: (1) to prevent or minimize the institutionalization of persons with developmental disabilities and their dislocation from family and community and (2) to enable persons with developmental disabilities to approximate the pattern of every day living of nondisabled persons of the same age and to lead more independent and productive lives. (§§ 4501 & 4685; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

2. The Lanterman Act defines the term "developmental disability" in subdivision (a) of section 4512: "'Developmental disability' means a disability that originates before an individual attains 18, continues, or can be expected to continue indefinitely, and constitutes a substantial handicap for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature." (See also Cal. Code Regs., tit. 17, § 54000, subd. (a).)

3. The term "substantial disability" is defined in subdivision (l) of section 4512: "'Substantial disability' means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and

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<sup>2</sup> All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

as appropriate to the age of the person: [¶] (1) Self-care. [¶] (2) Receptive and expressive language. [¶] (3) Learning. [¶] (4) Mobility. [¶] (5) Self-direction. [¶] (6) Capacity for independent living. [¶] (7) Economic self-sufficiency." (See also Cal. Code Regs., tit. 17, § 54001, subd. (a).)

4. Section 54000, subdivision (c), specifically excludes from eligibility handicapping conditions that are solely psychiatric disorders, learning disabilities, or physical in nature.

5. Neither the Lanterman Act appeal process (§ 4700 et seq.) nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. In this case claimant is arguing that she is eligible for services under the fifth category, namely, that she has a condition similar to mental retardation or requires treatment akin to one with mental retardation. Under such circumstances, claimant has the burden of establishing each fact which is essential to the claim of relief she is seeking. (Evid. Code, § 500.) And, as there is no statute that provides otherwise, the standard of proof to be applied in this proceeding is the preponderance of the evidence. (Evid. Code, § 115.)

#### Discussion

6. Claimant contends that due to her TBI she has a condition similar to mental retardation and requires treatment similar to that required for individuals with mental retardation. She contends that as a result of TBI, she is disabled in the areas of, receptive and express language, learning, self-care, mobility, capacity for independent living and self-direction, and economic self-sufficiency.

GGRC contends that claimant's IQ and adaptive functioning skills are such that she is not similar to one with mental retardation and that notwithstanding her weaknesses in executive functioning, she does not have the global impairments typical of one with mental retardation. GGRC also contends that claimant has the ability to improve, and therefore her deficits are unlikely to continue.

Under the fifth category, a condition must be closely related to mental retardation, or it must require treatment similar to that required for mentally retarded individuals. As stated by the court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Id.* at p. 1130.)

It was established by the preponderance of the evidence that as a result of her TBI, claimant has a disabling condition that is very similar to one with mental retardation and requires services similar to those required for individuals with mental retardation. As noted

in the Diagnostic and Statistical Manual of Mental Disorders (4th Ed. Text Rev.), mental retardation has many etiologies, one of which is head trauma in childhood. (*Id.* at pp. 41, 45-46.) Global impairment is not required for fifth category eligibility; indeed global impairment is not even required under the DSM-IV-TR for mental retardation.<sup>3</sup>

The term "cognitive" is defined by the regulations as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience." (Cal. Code Regs., tit. 17, § 54002.) Despite her outward appearance of functioning well, claimant's TBI has resulted in major impairments in each of these areas. Despite years of intervention, special education, treatment and therapies, her cognitive functioning is not improving. Consideration was given to the argument that claimant may have more ability to learn, and may learn differently, than one with mental retardation. These observations may be true, but the fact that she is higher functioning than one who meets the definition of mental retardation, does not mean that she is not akin to one with mental retardation or that she does not require similar services.

It was also established by preponderance of the evidence that claimant has significant functional limitations in three or more areas of major life activities. Among others, it was established that claimant has significant functional limitations in her capacity for learning, self-care, independent living, and economic self-sufficiency. Claimant is, therefore, substantially disabled.

It was also established by the preponderance of the evidence that claimant's condition originated before the age of 18, and that it can be expected to continue indefinitely.

### Conclusion

7. Claimant suffers from a condition similar to mental retardation, and in order to reach her full potential, requires interdisciplinary planning and coordination of special or generic services. The services she requires are similar to those required by the mentally retarded. Claimant's condition originated prior to the age of 18, and it can be expected to continue indefinitely. The condition constitutes a substantial disability to her. Claimant therefore meets the definition of developmental disability under section 4512, subdivision (a). She is eligible to receive regional center services under the Lanterman Act.

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<sup>3</sup> The DSM-IV-TR lists the diagnostic features of mental retardation as: "significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home-living, social/interpersonal skills, work, leisure, health, and safety. The onset must occur before the age of 18." (*Id.*, at p. 41.)

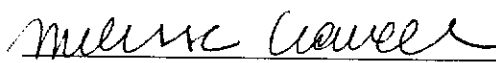
ORDER

The appeal of claimant Ayaka T. is granted. Claimant is eligible to receive services under the Lanterman Developmental Disabilities Services Act.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: March 28, 2008



MELISSA G. CROWELL

Administrative Law Judge

Office of Administrative Hearings